No. 82-386

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

KERR-McGEE CHEMICAL CORPORATION,

Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether an action in state court based entirely on state law may be removed to federal court solely on the defendant's assertion that such state law is preempted by a federal statute?

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RESPONDENT'S BRIEF IN OPPOSITION

STATUTES INVOLVED

28 U.S.C. §§ 1331(a), 1441(a), and 1447(c). These statutes are set out in the Appendix to this Brief.

STATEMENT OF THE CASE

This action, filed by Respondent People of the State of Illinois ("the State") in state court, concerns the waste disposal activities of Petitioner Kerr-McGee Chemical

Corporation ("Kerr-McGee") at a manufacturing site in West Chicago, Illinois. The complaint alleges that Kerr-McGee and its predecessor companies operated the site from 1932 until 1973 to produce various chemical compounds from thorium- and rare earth-bearing ores. (A 33)[1] The thorium (a radioactive element) and rare earths (nonradioactive elements) were extracted from the ores and purified by processing with various nonradioactive toxic substances. The wastes resulting from the operation were contaminated radiologically by residual thorium and nonradiologically by the chemicals, such as highly concentrated sulfuric acid and hydrochloric acid, used in the extraction and purification process. (A 33, 44)

Liquid wastes from the operations were disposed of by discharge into the ground at the rate of approximately 500,000 gallons a day and solid wastes were piled on the ground. (A 33) Waste material percolating through the ground consequently polluted the ground-water with nonradioactive contaminants, and surface run-off from the site similarly polluted a local stream. (A 44-45, 47-48) Over a million and a half cubic feet of waste remain piled and scattered at the site, posing a continuing threat of nonradioactive chemical contamination of ground and surface waters due to leaching rainwater and surface run-off. (A 33, 44-45)

The complaint alleged that these waste disposal practices, the resulting nonradioactive chemical water pollution, and the continuing nonradioactive chemical water pollution threat violate certain state statutes and common law. The complaint was based solely on state law claims. Kerr-McGee removed the action to federal district court, asserting that state regulation of these waste materials is

[1] "A" refers to the page of Kerr-McGee's Appendix.

preempted by the Atomic Energy Act, 42 U.S.C. §§2011 *et seq.* ("AEA"), under which the Nuclear Regulatory Commission ("NRC") has exclusive authority to regulate, and primary jurisdiction to adjudicate controversies concerning, thorium wastes. Kerr-McGee argued that such preemption gave the court "federal question" jurisdiction under 28 U.S.C. §§1441(a) and 1331(a). On the same federal question ground as well as because of diverse citizenship (28 U.S.C. §1332), Kerr-McGee also removed a state court action by the City of West Chicago ("City") challenging, *inter alia*, under the state and local law, the condition of Kerr-McGee's buildings and grounds (broken windows, scattered beer cans, etc). The district court assumed jurisdiction of both actions and dismissed them, holding that all the claims were preempted.

On appeal the Seventh Circuit consolidated the actions and, with respect to the State's action, held that a defensive assertion of federal preemption to state law claims does not confer federal question jurisdiction. (A 9, 11) In the City's action, the Seventh Circuit reached the merits of the preemption issue and held that while the AEA preempts state and local regulation of radiation hazards, it does not preempt regulation of nonradiation hazards. (A 15, 18) Finding that nothing in the record indicated that the relief sought by the City would interfere with NRC regulation of radiation hazards, the court held that on remand the action will be preempted only to the extent that an actual conflict is shown to exist between the NRC's authority over radiation hazards and the City's authority over other hazards. (A 20, 23) Kerr-McGee has not petitioned for certiorari with respect to the City's action.

REASONS FOR DENYING THE WRIT

I.

The Seventh Circuit Correctly Ordered Remand Because The Complaint Does Not Plead A Federal Cause Of Action

The Seventh Circuit remanded this case because it alleges only state causes of action (A 9) and because Kerr-McGee's defense of federal preemption, like any other defense based on federal law, is not a ground for removal. (A 11). The court correctly considered its decision to be compelled by an unbroken line of Supreme Court cases limiting "federal question" jurisdiction (28 U.S.C. §1331) to those cases in which the complaint pleads a federal cause of action, i.e., a right arising out of federal law. *Phillips Petroleum Co. v. Texaco*, 415 U.S. 125 (1974); *Pan American Petroleum Corp. v. Superior Court*, 366 U.S. 656 (1961); *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667 (1950); *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100 (1941); *Gully v. First National Bank*, 299 U.S. 109 (1936); *Arkansas v. Kansas & Texas Coal Co.*, 183 U.S. 185 (1901); *Tennessee v. Union and Planters' Bank*, 152 U.S. 454 (1894).

These cases enunciate the principle that only a federal cause of action, not a defense based on federal law, creates federal question jurisdiction. There are no Supreme Court cases to the contrary. *Avco Corp. v. Aero Lodge No. 735*, 390 U.S. 557 (1968), cited by Kerr-McGee, did not permit removal on the basis of a federal preemption defense. There the defendant removed a suit to enforce a collective bargaining agreement. The Court held that removal was proper because Section 301 of the Labor Management Relations Act, 29 U.S.C. §185, gives jurisdiction to federal courts over suits to enforce collec-

tive bargaining agreements, and any applicable state law has not survived the enactment of Section 301. In other words, a complaint which seeks to enforce a collective bargaining agreement necessarily pleads a federal cause of action and is therefore removable. Thus, *Avco* is fully consistent with the Court's traditional approach to federal question jurisdiction.[2]

II.

There Is No Conflict Among The Courts Of Appeals On The Question Presented

By failing to distinguish among the various kinds or effects of "federal preemption," Kerr-McGee has created the illusion that the Courts of Appeals differ on the question whether removal is justified by a defensive assertion that state claims are preempted. Whenever federal law has preempted an area, federal substantive law will govern the parties' rights. However, the fact that federal law may have preempted an area does not necessarily mean that the preempting law has created a cause of action in federal court to vindicate those rights. Th

[2] Kerr-McGee also cites *Federated Dept. Stores v. Moitie*, 425 U.S. 394 (1981), as support for its position. That case, however, is at most of dubious relevance. *Moitie* dealt not with removal but with a res judicata question. The only reference to removal was made in a footnote; there the Court remarked that it would not disturb the lower court's finding on removal that the plaintiffs "had attempted to avoid removal jurisdiction by 'artfully' casting 'essentially federal law claims' as state-law claims." 452 U.S. at 397, n. 2. In his sole dissent Justice Brennan observed that in its "eagerness" to correct the lower court's decision on res judicata, the majority improperly failed to examine the removal question. It is surely correct that the very brief treatment of the removal issue in *Moitie* belies any suggestion that that case reverses or affects the principles of federal jurisdiction adhered to by this Court for the past century.

Courts of Appeals which have permitted removal on the basis of "federal preemption" have done so because the preempting law created a federal cause of action, not because the preempting federal law provided (or was asserted to provide) a defense to state claims. Those appellate decisions cited by Kerr-McGee which did permit removal where federal law was raised merely as a defense have all been reversed, explicitly or implicitly, by subsequent decisions.[3]

The most recent relevant case in the First Circuit appears to be *Brough v. United Steelworkers of America*, 437 F.2d 748 (1st Cir. 1971), which held that a defense of federal preemption does not justify removal even where the state claim is no longer viable because of the preempting federal law.

For the Second Circuit, Kerr-McGee cites *North American Phillips v. Emery Air Freight*, 479 F.2d 229 (2nd Cir. 1978), which does indeed conflict with the Supreme Court authority cited above. However, a subsequent removal case, *Vitarroz v. Borden, Inc.*, 644 F.2d 960 (2nd Cir. 1981), held that only a federal cause of action confers federal jurisdiction. *Vitarroz* thus implicitly overruled *North American Phillips* and explicitly overruled *Beech-Nut, Inc. v. Warner-Lambert Co.*, 480 F.2d 801 (2nd Cir. 1973), also cited by Kerr-McGee. 644 F.2d at 964, n. 2.

The Third Circuit also rejects the notion that a defense of federal preemption is a ground for removal. *Trent Realty Ass'n v. First Fed. Sav. & Loan Ass'n*, 657 F.2d 29 (3rd Cir. 1981).

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[3] Kerr-McGee indicates that the district courts are also in conflict on the issue presented here. If true, that is a problem for the Courts of Appeals, not this Court, to remedy.

The State found no relevant cases, and Kerr-McGee cited none, in the Fourth Circuit.

In the Fifth Circuit, *Till v. Unifirst Fed. Sav. & Loan Ass'n*, 653 F.2d 152 (5th Cir. 1981), permitted removal of a case where the complaint pleaded a federal cause of action under the National Flood Insurance Program. While the plaintiffs ultimately failed to demonstrate that federal law implied a private right of action as claimed, and the case was therefore dismissed, the court stressed that only the pleading of a federal cause of action creates federal jurisdiction.

For the Sixth Circuit, Kerr-McGee cites *McKinney v. International Ass'n of Machinists*, 624 F.2d 745 (6th Cir. 1980). The plaintiffs pleaded two claims, one against their employer for violating their employment contract and the other against their union for violating its duty of fair representation in connection with the circumstances surrounding the first cause of action. Removal was upheld. While the first claim did not state a federal cause of action, the second, as the court made clear, did. The action was therefore removable consistent with the Supreme Court authority cited above and does not support Kerr-McGee's position.

In the Seventh Circuit, the decision below as well as an earlier decision which the Kerr-McGee court explicitly reaffirmed (A 11), *Bailey v. Logan Square Typographers*, 441 F.2d 47 (7th Cir. 1971), held that a federal preemption defense to a state claim does not confer jurisdiction.

In the Eighth Circuit, *First National Bank of Aberdeen v. Aberdeen National Bank*, 627 F.2d 843 (8th Cir. 1980), rejected a federal preemption defense as a basis for removal. *Lawrence County v. South Dakota*, 668 F.2d 27 (8th Cir. 1982), reaffirmed *Aberdeen*.

In the Ninth Circuit, *Sheeran v. General Elec. Co.*, 593 F.2d 93 (9th Cir. 1979), and *Fristoe v. Reynolds Metal Co.*, 615 F.2d 1209 (9th Cir. 1980), *cert. den.* 444 U.S. 868, cited by Kerr-McGee, were properly removed because like *Avco*, *supra*, they were suits for violation of a collective bargaining agreement. *Meyers v. Beverly Hills Fed. Sav. & Loan Ass'n*, 499 F.2d 1145 (9th Cir. 1974), also cited by Kerr-McGee, did indeed allow removal in the absence of the pleading of a federal cause of action. However, in a subsequent opinion, *Guinasso v. Pacific First Fed. Sav. & Loan Ass'n*, 656 F.2d 1364 (9th Cir. 1981), *cert. den.* 102 S. Ct. 1716, the court noted that in *Meyers* it had not commented on the propriety of removal and overruled that case. The court considered itself bound by its previous cases, including *Washington v. Amer. League of Professional Baseball Clubs*, 460 F.2d 654 (9th Cir. 1972). *Nalore v. San Diego Fed. Sav. & Loan Ass'n*, 664 F.2d 841 (9th Cir. 1981), *cert. den.* 102 S. Ct. 1719, relied on *Guinasso* and *Washington v. Amer. League* in rejecting a federal preemption defense as ground for removal. In view of these developments in the Ninth Circuit, *Lafferty v. Solar Turbines Internat'l*, 666 F.2d 408 (9th Cir. 1982), must be viewed as an anomaly. There the court permitted a removal even though the plaintiffs admitted they had no cause of action under federal law. In *Lafferty*, the court affirmed removal without reference to any judicial authority.

In the Tenth Circuit, *North Davis Bank v. First Nat'l Bank*, 457 F.2d 820 (10th Cir. 1972), improperly permitted removal in the absence of a federal cause of action. Subsequently, however, the court clearly held that a federal preemption defense to a state claim does not create federal jurisdiction. *Madsen v. Prudential Fed. Sav. & Loan Ass'n*, 635 F.2d 797 (10th Cir. 1980), *cert. den.* 451 U.S. 1018.

The State found no relevant cases, and Kerr-McGee cited none, in the Eleventh and Twelfth Circuits.

In summary, there is no real or significant conflict among the Courts of Appeals on the question presented here and thus no need for this Court to grant a writ of certiorari.

III.

The Atomic Energy Act Does Not Preempt State Regulation Of Nonradiation Hazards

Although Kerr-McGee has not expressly petitioned for certiorari as to that portion of the Seventh Circuit's decision concerning preemption, Kerr-McGee seems implicitly to be raising the question whether that decision was correct. Due to the ambiguity of Kerr-McGee's petition, the State, without conceding that such question is properly before this Court, will briefly respond.

The Seventh Circuit correctly ruled that the AEA does not preempt state regulation of nonradiation hazards. The cases cited by Kerr-McGee in support of preemption here, *Northern States Power Co. v. Minnesota*, 447 F.2d 1143 (8th Cir. 1971), *sum. aff'd* 405 U.S. 1035, and *Train v. COPIRG*, 426 U.S. 1 (1976), addressed only the question whether regulation of radiation hazards is preempted. Those decisions held that regulation of such hazards is preempted, but no court has ever extended the AEA's preemptive reach to nonradiation hazards. Indeed, every court which has examined the question has specifically ruled that regulation of nonradiation hazards is not preempted. *New Hampshire v. AEC*, 406 F.2d 170 (1st Cir. 1969); *Pacific Gas & Electric Co. v. State Energy Comm'n*, 659 F.2d 903 (9th Cir. 1981), *cert. granted* 102 U.S. 2956;[4]

[4] *Pacific Gas & Elec. Co.* involves California's "moratorium" on construction of nuclear power plants. The fact situation there and that involved here are thus quite different.

People v. Kerr-McGee Chemical Corp., 677 F.2d 571 (7th Cir. 1982) (decision below); *PASNY v. New York*, No. 77-596 (S.D.N.Y. 1979), CCH Nuc.Reg.Rptr. ¶20,105. The NRC has also consistently held that its exclusive jurisdiction applies only to radiation hazards. *In the Matter of Consolidated Edison Co.*, 7 NRC 31 (1978); *In the Matter of Long Island Lighting Co.*, 9 NRC 51 (1979); *In the Matter of Southern California Edison Co.*, 7 AEC 38 (1974).

Because the State's action addresses only nonradiation hazards, it is not preempted by the AEA. Therefore, consistently with the Seventh Circuit's approach, on remand the State's suit will be preempted only to the extent that an actual conflict is shown to exist between the NRC's authority over radiation hazards and the State's authority over nonradiation hazards. (A 20, 23).[5]

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[5] At pages 3 and 14 of its Petition, Kerr-McGee refers to an NRC Draft Environmental Statement ("DES") which allegedly "recommends that the wastes be encapsulated on the present facility site" and thus implicitly conflicts with the State's lawsuit aimed at requiring removal of the wastes from the site. First, this NRC document is not in the record of this case. It was issued shortly after the decision below, and Kerr-McGee did not bring it to the Seventh Circuit's attention in its Petition for Rehearing. Second, the NRC's alleged recommendation is relevant only to the factual question of conflict and is therefore properly presented to the trial court, not to this Court. Finally, without discussing the substance of the DES, the State completely disagrees with Kerr-McGee's representation as to the DES's recommendation.

CONCLUSION

For the foregoing reasons the State submits that the Court should deny the Petition For A Writ Of Certiorari.

Respectfully submitted,

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APPENDIX

28 U.S.C. §1331

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interests and costs, and arises under the Constitution, laws, or treaties of the United States, except that no such sum or value shall be required in any such action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity.

28 U.S.C. §1441

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State Court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

28 U.S.C. §1447

(c) If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case, and may order the payment of just costs. A certified copy of the order of remand shall be mailed by its clerk to the clerk of the State court. The State court may thereupon proceed with such case.